DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 04-20140017
Sales Tax
For Tax Years 2010-12

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Taxpayer did not provide adequate documentation to verify its position that certain vehicles were delivered out-of-state, and therefore exempt from sales tax. The imposition of sales tax was correct.

ISSUES

I. Sales Tax–Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-5-15; Sales Tax Information Bulletin 28S. Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, (Ind. Tax Ct. 2007); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014); Hutchison v. State Bd. of Tax Comm'rs 520 N.E.2d 1281 (Ind. Tax Ct. 1988); Subaru-Isuzu Auto., Inc. v. Ind. Dept. of State Revenue, 782 N.E.2d 1071 (Ind. Tax Ct. 2003); 45 IAC 2.2-5-21.

Taxpayer protests the imposition of sales tax on the sale of vehicles to non-resident customers.

II. Tax Administration–Ten-Percent Negligence Penalty

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b); 45 IAC 15-11-2(c)

The taxpayer protests the imposition of the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a car dealership in Indiana. After an audit for the years 2010, 2011 and 2012, the Indiana Department of Revenue ("Department") determined that Taxpayer failed to collect sales tax on vehicles sold to non-resident customers. The Department therefore issued proposed assessments for sales tax. Taxpayer protested the proposed assessment. A hearing was held, and this Letter of Finding results. Additional facts will be supplied as required.

I. Sales–Imposition.

DISCUSSION

Taxpayer protests the imposition of sales tax on vehicles sold to non-resident customers in the tax years 2010, 2011, and 2012, which the Department determined were not exempt. The Department based its determination on Taxpayer's sales records for 2012, which showed sales where no sales tax was collected and no record of a valid exemption certificate was on file. Taxpayer provided affidavits with customers' signatures stating that the vehicles they purchased were delivered out-of-state. The Department sent letters to customers to verify the accuracy of the affidavits. Some of the customers replied that they had taken delivery of their vehicles at the dealership, refuting the statements on the affidavits. The Department then calculated an error rate for the sales in 2012, with the numerator being the total taxable amount of sales from customers who responded that they had received their vehicle at the dealership, and the denominator being the total taxable amount of sales from all of the customers who responded to the letters. This error rate was then applied to the total sales Taxpayer claimed were from vehicles delivered out-of-state in 2010 and 2011.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect.

As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

> (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
> (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

(Emphasis added).

Therefore, retail merchants are required to collect sales tax on retail transactions, unless the transaction is exempt from sales tax.

A. Sales Tax Exemption

Taxpayer refers to 45 IAC 2.2-5-21, which states:

> The state gross retail tax shall not apply to sales of motor vehicles, trailers, and aircrafts, delivered in Indiana for immediate transportation to a destination outside of Indiana and for licensing or registration for use in another state, and not to be licensed or registered in Indiana.

Taxpayer argues that 45 IAC 2.2-5-21 was in effect during the audited years because it was not repealed until December 5, 2012, and therefore Taxpayer did not have to collect sales tax on any vehicle to be immediately transported out of state. However, 45 IAC 2.2-5-21 derived its authority from IC § 6-2.5-5-15, which was repealed effective July 1, 2004. In Hutchison v. State Bd. of Tax Comm'rs 520 N.E.2d 1281 (Ind. Tax Ct. 1988), the Tax Court considered agency regulations which were out of harmony with the underlying statute. "An administrative agency's regulations must fall within the scope of the agency's enabling legislation. The agency cannot enlarge or vary the power given by the legislature or create a rule out of harmony with the statute." Id. at 1283. See also Subaru-Isuzu Auto., Inc. v. Ind. Dept. of State Revenue, 782 N.E.2d 1071 (Ind. Tax Ct. 2003) ("An administrative rule is a nullity where the provision upon which the rule is based has been repealed." Id. at 1076 n.8). Therefore, as explained by the Tax Court in Hutchison and Subaru-Isuzu, 45 IAC 2.2-5-21 was not in effect during the audited years. Therefore, the regulatory exemption upon which Taxpayer relies was not in effect during the tax years at issue, and Taxpayer was responsible for collecting sales tax on all its sales in Indiana.

B. Error Rate for Calculation of Total Taxable Sales

Next, Taxpayer claims that the proposed assessments on its sales in Indiana were overstated. Taxpayer argues that the Department should not overlook the affidavits, signed by customers, stating that the delivery occurred outside Indiana. Taxpayer claims that the letters sent to its customers by the Department were intimidating and misleading, which lead to inaccurate results. The Department sent letters to 281 of the Taxpayer's non-resident customers. Out of 206 responses received, 87 customers verified that they had picked up their vehicle at the dealership, making the vehicles subject to sales tax. The Department notes that the affidavits were usually signed on the same day as the sale of the vehicle. In response, Taxpayer sent its own letters to twenty-five randomly selected customers from 2012 to confirm where they received their vehicles. Out of fourteen customers who originally responded to the Department's letters that they received their vehicle at the dealership, six customers responded to the Taxpayer's letters that they received their vehicle out-of-state. Taxpayer believes this inconsistency proves the Department's letters to the customers were misleading. Therefore, Taxpayer believes the error rate used to calculate the total taxable sales during the audit period was incorrect.

Sales Tax Information Bulletin 28S states, "Terms and method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale." Therefore, as provided by Sales Tax Information Bulletin 28S, to be exempt from collecting

Indiana sales tax, Taxpayer must provide a sales invoice or purchase order which lists the delivery terms in order to prove that the vehicle was sold outside of Indiana. Taxpayer did not provide documentation that the terms and method of delivery were indicated on the sales invoice. Taxpayer relies only on its affidavits to support its position. After review, the Department concludes that this documentation is not sufficient by itself to establish the vehicles were delivered out of state pursuant to Sales Tax Information Bulletin 28S. Therefore, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) to prove the proposed assessment was incorrect.

C. Double Taxation

Next, Taxpayer claims that the proposed assessments create an unconstitutional double taxation. At the time the sales in question were made, Indiana required sales tax to be collected on all retail sales that were not exempted. There was no exemption on Indiana sales of vehicles to customers immediately transporting and then titling vehicles out of state pursuant to the repeal of IC § 6-2.5-5-15 effective July 1, 2004. Taxpayer was legally obligated to collect the sales tax on all of these sales. Pursuant to IC § 6-2.5-2-1(b), Taxpayer, as a retail merchant, was required to either collect sales tax on vehicles delivered in Indiana or to indicate delivery terms and locations on out-of-state deliveries on the sales invoices. Taxpayer did neither for the sales in question, and therefore has not met the burden imposed by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration–Ten-Percent Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides the standard for waiving the negligence penalty:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this case, Taxpayer incurred a deficiency that the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1. Taxpayer admitted that it was aware that problems existed at the dealership in some instances where vehicles were not delivered out of state despite affidavits bearing customer's signatures stating that out-of-state delivery occurred. Taxpayer was aware that it was failing to collect sales tax on sales completed in Indiana, and it provided the Department with unreliable documentation during the audit process. Taxpayer has not affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c). Therefore,

the ten-percent negligence penalty is appropriate.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest in Issue I regarding the proposed assessment of additional sales tax on the sale of vehicles to non-resident customers is denied. Taxpayer's protest in Issue II regarding the imposition of a ten-percent negligence penalty is denied.

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